Supreme Court, U. S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1833

HAL FRANCIS RACHAL,
On behalf of Himself and All Members of a Class,

Petitioner,

v.

UNITED STATES BUREAU OF PRISONS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

HAL RACHAL, pro se,
1410 Country Club Drive,
Midland, Texas 79701.

SOUTHWESTERN LAW PRESS — DALLAS, TEXAS — (214) 742-4257

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I. OPINIONS BELOW

The opinion of the Court of Appeals is appended hereto as Appendix "A." It is reported in ..... F. 2d .....

II. JURISDICTION

This is a petition for certiorari to review a decision of the United States Court of Appeals for the Fifth Circuit in an action brought in the United States District Court for the Western District of Texas, San Antonio Division, by Petitioner,

on his own behalf and, as a class action, on behalf of all persons who were placed in custody of a Court upon execution of a pre-sentence bond and/or a post-sentence bond which restricted his travel. Petitioner prayed that Respondent be mandamused to credit him and other members of the class with the pre-sentence time and the post-sentence time that he and other members of the class were in the custody of the Court under bonds which restricted travel. The District Court dismissed the action without a hearing on the grounds that it was frivolous, without merit, and constituted an intentional burdensome imposition upon the Court's time. The Court of Appeals affirmed the order of dismissal without a hearing and without an opinion. The decision of the United States Court of Appeals for the Fifth Circuit is dated and entered on May 7, 1974. This Court's jurisdiction is invoked under the Provision of 28 U.S.C. Section 1254(l).

III. QUESTIONS PRESENTED

1. Whether a person should be given credit towards service of his sentence for any days spent in custody of a court as a result of being under a bond which restricted his travel and thereby placed such person under restraints not shared by the public generally.

IV. STATUTES INVOLVED

The statute involved in this case is:

Title 18, Section 3568 United States Code.

V. STATEMENT

Petitioner was indicted on June 17, 1970, was arrested on

June 18, 1970, and was placed in the custody of the Court upon the execution of a bail bond which restricted his travel to the Western District of Texas. Said bond remained in full force and effect until he was sentenced on June 11, 1971, at which time he was placed in the custody of the Attorney General. (Court of Appeals Appendix 3, 11-12)

On June 14, 1971, Petitioner executed an appeal bond which restricted his travel to the Western District of Texas and was placed in the custody of the Court where he remained until March 7, 1973, at which time he was placed in the custody of the Attorney General where he has remained to date. (Court of Appeals Appendix 3, 13-18)

In computing the sentence, Respondent credited Petitioner with the pre-sentence time and the post-sentence time that he was in the custody of the Attorney General but did not credit him with either the pre-sentence time or the post-sentence time that he was in the custody of the Court. (Court of Appeals Appendix 3, 22)

Jurisdiction in the Court of first instance was predicated on Sections 3146 and 3568 of Title 18 of the U.S.C.

VI. REASONS FOR GRANTING THE WRIT

The Court of Appeals has decided an important question of Federal Law which has not been, but should be, settled by this Court.

VII. ARGUMENT

Prior to 1966 and prior to 1963, Title 18, Section 3568, U.S. Code, read, in part, as follows:

> "The Attorney General shall give any such person credit toward service of his sentence for any days spent in custody prior to the imposition of sentence by the sentencing court *for want of bail* * * *." (emphasis added) As amended September 2, 1960 Pub. L. 86-691, Sec. 1(a). 74 Stat. 738.

In 1963, the Supreme Court defined the term custody as being restraints on a person's liberty not shared by the public generally. *Jones v. Cunningham* (1963) 371 U.S. 236. The English Common Law also defines custody as restraints on a person's liberty.

Three years after the Jones decision, the Bail Reform Act of 1966 was enacted which gave the courts the power and authority to put restraints in pre-sentence bonds and post-sentence bonds similar to restraints on a parolee who is held to be in custody under Title 28, Section 2241, U.S. Code.

Congress, being thoroughly familiar with the Jones decision, amended Section 3568 as part of the Bail Reform Act of 1966 to read in part, as follows:

> "The Attorney General shall give any such person credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed." As amended June 22, 1966, Pub. L. 89-465, Sec. 4, 80 Stat. 217.

The 1966 amendment of 18 U.S.C. 3568 deleted the phrase "for want of bail." Congress obviously intended that a person could be in custody, bail notwithstanding. What other reason would Congress have had for so amending 18 U.S.C. 3568? If Congress had intended that custody be limited to

incarceration it would have undoubtedly so defined it, particularly since the phrase "for want of bail" was deleted. Furthermore, had Congress intended the term "custody" to have a different meaning in Title 18, Section 3568 than it had in Title 28, Section 2241, it would certainly have defined the term just as it saw fit to define "offense," in Title 18, Section 3568.

Bureau of Prisons Policy Statement No. 7600.51 dated October 30, 1969, in paragraph 6 on page 4 thereof, credits a person whose probation is revoked with the time he spent on probation, as follows:

> "(6) If the court suspended the imposition or execution of sentence and placed the defendant on probation prior to the Bail Reform Act and revokes probation and orders the sentence into execution after the Bail Reform Act, the individual will receive credit at the time of probation revocation. *In other words, all probation violators, whose probation is revoked and whose sentence is executed on or after September 20, 1966, will receive credit.*" (emphasis added)

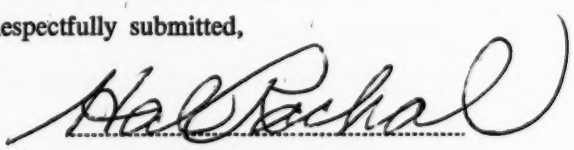
CONCLUSION

Because of the frequency with which the United States Court of Appeals for the Fifth Circuit has already been called upon to decide this issue, because the other Circuits will no doubt be called upon numerous times to decide the same issue, because the Bureau of Prisons has promulgated a policy inconsistent with the decision in this case insofar as probation violators are concerned, because the Fifth Circuit has defined "custody" differently from the English Common Law and the decision of this Court in *Jones v. Cunningham,*

supra, and because the Fifth Circuit has decided an important question of Federal Law which has not been settled by this Court:

It is respectfully submitted that the Court should grant Petitioner's prayer for Writ of Certiorari.

Respectfully submitted,



HAL RACHAL, pro se,
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APPENDIX

In the

United States Court of Appeals

For The Fifth Circuit

No. 74-1635
Summary Calendar*

HAL FRANCIS RACHAL,
Petitioner-Appellant,

v.

UNITED STATES BUREAU OF PRISONS,
Respondent-Appellee.

Appeal from the United States District Court
For the Western District of Texas

(May 7, 1974)

Before COLEMAN, DYER and RONEY, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1] See also Polakoff v. U.S., 5th Cir. 1974, 489 F. 2d 727; and Cochran v. U.S., 5th Cir. 1974, 489 F. 2d 691.

*Rule 18, 5 Cir., Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F. 2d 409, Part I.

[1] See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F. 2d 966.

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HAL FRANCIS RACHAL, PETITIONER

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UNITED STATES BUREAU OF PRISONS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner contends he was entitled to credit against his sentence for time he spent on bail prior to trial since the bail bond restricted him to travel within the Western District of Texas and therefore amounted to confinement.

Petitioner was convicted of thirteen counts of conspiracy, mail fraud, sale of unregistered securities, and securities fraud, in violation of 15 U.S.C. 77q (a) and 77e(a)(2), and 18 U.S.C. 1341 and 371. See *United States* v. *Rachal*, 473 F.2d 1338 (C.A. 5), certiorari denied, 412 U.S. 927. He was sentenced to

five years' imprisonment and fined $10,000 on Count 13. He was also sentenced to five years' imprisonment on Counts 1-12, to run concurrently with the sentence on Count 13. Petitioner filed a class-action petition for a writ of mandamus under 28 U.S.C. 1361, praying that the court order the Bureau of Prisons to credit the time spent on bail against time to be served under his sentence. The district court dismissed the petition on the grounds that the contention was frivolous. The court of appeals affirmed without opinion (Pet. App. A-1).

1. It is well established that a bail bond restricting travel is not a form of custody that a prisoner is entitled to have credited against his sentence. As was stated in *Polakoff* v. *United States*, 489 F.2d 727, 730 (C.A. 5) (footnotes omitted):

> The "custody" contemplated by Section 3568 is that characterized by incarceration; a federal sentence does not begin to run, and credit thus accrue, until the prisoner is received at the place of imprisonment. *Scott* v. *United States*, 5 Cir. 1970, 434 F.2d 11, 21 (per curiam). Polakoff, in effect, seeks a determination that he was "serving time" while free on bond, merely because he was under restrictions. We must agree with the Ninth Circuit that "[t]here is no reason for treating time spent on bail as jail time." *Sica* v. *United States*, 9 Cir. 1971, 454 F.2d 281, 282 (per curiam).
>
> The Supreme Court's decision in *Hensley* v. *Municipal Court* [411 U.S. 345] * * * does not compel a contrary conclusion. *Hensley* stands for the limited proposition that a state prisoner

> Who has exhausted his state remedies and has been released on his own recognizance pending application for federal relief is "in custody" within the meaning of the federal habeas corpus statute, Title 28, United States Code, Sections 2241(c)(3) and 2254(a). Nothing in the opinion intimates an intention to allow federal prisoners sentence credit for time spent free on bond; by its very terms the decision is a limited one. See *Cochran* v. *United States*, 5 Cir. 1974, 489 F.2d 691, which reaches a similar conclusion.

Accordingly, the petition was properly dismissed as frivolous.

2. Moreover, there are alternative grounds, not raised below, on which the district court's dismissal of the petition could have rested.

It is well established that mandamus under 28 U.S.C. 1361 is not available unless "three elements * * * coexist: (1) a clear right in the plaintiff to the relief sought; (2) a clear duty on the part of the defendant to do the act in question; and (3) no other adequate remedy available." *Amaya* v. *United States Board of Parole*, 486 F. 2d 940, 943 (C.A. 5), vacated and remanded on other grounds, June 24, 1974, No. 73-1209; see *Peoples* v. *United States Department of Agriculture*, 427 F. 2d 561, 565 n.9 (C.A.D.C.). With particular regard to the first two criteria, it has been said that "[t]he purpose of mandamus is not to establish a legal right but to enforce one already established * * *." *United States ex rel. American Silver Producers' Ass'n* v. *Mellon*, 32 F. 2d

415, 418 (C.A.D.C.), certiorari denied, 280 U.S. 561. For the reasons noted (*supra*, pp. 2-3), it cannot be said that petitioner's claimed right to credit against his sentence was clearly established. Moreover, petitioner had another adequate remedy available—habeas corpus. Indeed, because he is a prisoner challenging "duration of his confinement * * *" and "seeking immediate or speedier release from that confinement—the heart of habeas corpus" [1] (*Preiser* v. *Rodriquez*, 411 U.S. 475, 489, 494, 498), his sole remedy would appear to be habeas corpus. It is well established, however, that mandamus cannot be used as a substitute for habeas corpus. *McMurtrey* v. *Clark*, 157 F. 2d 703, 704 (C.A.D.C.), certiorari denied, 329 U.S. 805 ("mandamus never lies except where there is no other remedy and here habeas corpus is still available"); *Taylor* v. *United States Board of Parole*, 194 F. 2d 882, 883 (C.A.D.C.); *Amaya* v. *United States Board of Parole*, *supra*.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1974.

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[1] The only relief petitioner sought was a crediting of time on bail against his sentence, which would normally result in speedier release from confinement. The case presents no question as to jurisdiction over claims concerning conditions of confinement.

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